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No. 06-358

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IN THE

Supreme Court of the United States

JOSEPH R. CAMPBELL and MARILYN L. CAMPBELL,

Petitioners,

v.

RAINBOW CITY, ALABAMA, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

H. EDGAR HOWARD
140 South 9th Street
Post Office Box 388
Gadsden, Alabama 35902
(256) 546-5432

Counsel for Respondents

203876

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

1. Whether compelling reasons have been shown for this Court to grant certiorari, where plaintiffs fail to show that the Eleventh Circuit's analysis of their claims conflicts with any holding of this Court or of a circuit court of appeals, or of a state court of last resort.

2. Whether compelling reasons have been shown for this Court to grant certiorari, where the Eleventh Circuit found that plaintiffs failed as a matter of law to offer sufficient evidence to go to the jury on their First Amendment and equal protection claims.

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I

STATEMENT OF THE CASE

Two years after he ran unsuccessfully for mayor of Rainbow City, Petitioner Joseph Campbell and his wife, Petitioner Marilyn Campbell, sought to develop property they owned in Rainbow City, Alabama, into a large apartment complex. They met with the mayor and then with the planning commission on numerous occasions but did not receive the necessary approvals from the planning commission to build on their property. They later sought a number of variances from the Rainbow City Board of Adjustment, which denied their variance requests.

Claiming that Campbell's criticism of the mayor during his run for office formed the basis for the thwarting of their development plans, Petitioners filed suit claiming that Rainbow City had violated their equal protection rights under the Fourteenth Amendment and their First Amendment rights, retaliating against them for Mr. Campbell's outspoken criticism of the incumbent mayor two years earlier.

The case proceeded to trial and a jury returned a verdict for the plaintiffs.

Rainbow City appealed to the United States Court of Appeals for the Eleventh Circuit, arguing that the district court had erroneously denied their Rule 50 motion for judgment as a matter of law.[1]

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1. The City also appealed the district court's ruling on several other grounds, but these grounds were not addressed because the appeals court concluded that the district court should have granted the Rule 50 motion.

The Eleventh Circuit reversed the trial court, finding that plaintiffs had failed as a matter of law to prove their claims. First, the court held, the plaintiffs failed as a matter of law to show that the City's final policymaker acted with an unconstitutional motive, and thus no reasonable jury could find that the City violated the plaintiffs' First Amendment rights. Secondly, the court found that the plaintiffs had not offered sufficient evidence of similarly-situated individuals who were treated differently from them, and thus did not make out an equal protection claim. The court reversed the trial court and directed it to enter judgment in favor of the City.

Plaintiffs petitioned for rehearing in the Eleventh Circuit, but their petition was denied.

REASONS FOR DENYING THE PETITION

I. Plaintiffs have failed to carry their burden to show that the Eleventh Circuit's analysis of their claims conflicts with any holding of this Court, of a circuit court of appeals, or a state court of last resort.

First, plaintiffs argue that the Eleventh Circuit's opinion is in conflict with that of the First Circuit in *Nestor Colon Medina & Sucesores, Inc. v. Custodio*, 964 F.2d 32 (1st Cir. 1992). The conflict, according to plaintiffs, is that in *Nestor*, the First Circuit found that those plaintiffs' evidence rose to the level of a triable issue, because there was hostility to plaintiffs' partisan political views and affiliation, and because a residential site for which a site permit was denied was essentially similar to other projects for which permits had been routinely granted. *Id.* at 39. In the case below, however, the Eleventh Circuit found simply that the plaintiffs had failed

to raise an issue of genuine material fact to establish similarly situated comparators who were treated better than plaintiffs.[2] There is no conflict presented by the holdings of the First Circuit in *Nestor* and the Eleventh Circuit in this case. The respective appellate courts merely found different facts.[3]

Furthermore, plaintiffs' argument regarding the alleged conflict between *Nestor* and this case is superfluous. The question before the Eleventh Circuit was not whether the facts raised a question of retaliation, which is what the First Circuit discussed in *Nestor*. In this case, the Eleventh Circuit assumed, for purposes of argument, that retaliation had indeed been properly shown by the plaintiffs. *Campbell*, 434 F.3d at 1313, Pet. Appx. 10a. The issue upon which the Eleventh Circuit reversed was the plaintiffs' proof *vel non* that the planning commission, the final policymaker, acted with improper motive. *Id.*

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2. The Eleventh Circuit's discussion of similarly situated comparators is in its equal protection discussion, found at 434 F.3d 1306, 1313-1317 (11th Cir. 2006) and at Pet. Appx. 12a.

3. Actually, in *Nestor* the First Circuit ruled only that the plaintiffs' residential permit First Amendment claim survived what the First Circuit said was the 12(b)(6) standard which had been effectively applied by the trial court, and that the plaintiffs' residential permit claim had been "pleaded with sufficient particularity to entitle" plaintiff to survive an early summary judgment. The court went on to say that, "the facts in support of [plaintiff's] allegation that permits were routinely granted for other, similar properties are, at best, sketchy. There is merely a short list of other projects which were approved, giving almost no explanation of how these projects were similar to [plaintiff]'s project. . . . However, because the district court denied further discovery on this point, we think the appropriate course is to remand for such discovery. After discovery is completed, defendants may renew their motion for summary judgment." *Nestor*, 964 F.2d at 41.

Thus the plaintiffs' suggestion that *Nestor* conflicts with the Eleventh Circuit's decision in the instant case is wrong. Moreover, plaintiffs' discussion of *Nestor* and its holding really has nothing to do with anything pertinent to whether there are compelling reasons for this Court to grant certiorari.

In their argument 2,[4] plaintiffs allege that the Eleventh Circuit erred in not recognizing the "rubber stamp" theory as it impacts the determination of the final policymaker for a municipality. The plaintiffs aver that the Eleventh Circuit does not recognize the "rubber stamp" theory, while other circuits do.[5]

Again plaintiffs' argument is misplaced. Nowhere in the Eleventh Circuit's opinion does the court decide whether or not the "rubber stamp" theory is a valid method of finding liability. The court simply found that there was no evidence that the planning commission, the final policymaker, knew of any unconstitutional motive on the part of the mayor, nor that the planning commission ratified any unconstitutional motive on the part of the mayor. Without any such evidence showing that a majority of the members of the commission, the final policymaker, acted with an unconstitutional motive, the trial court erred in denying the Rule 50 motion. *Id.*

Boiled down, the plaintiffs' argument is nothing more than a disagreement with the Eleventh Circuit on what constitutes sufficient evidence to create a jury issue. According to Rule 10 of the rules of this Court, such

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4. *See* Petition at 9.

5. Citing *Johnson v. State of Louisiana*, 369 F.3d 826 (5th Cir. 2004); *Beatty v. Madison County School District*, 254 F.3d 595 (5th Cir. 2001).

disagreement over fact findings rarely constitutes the basis for this Honorable Court to grant a petition for certiorari. *See* Rule 10, Rules of the Supreme Court of the United States.

Besides that, the Eleventh Circuit's opinion shows that it was well aware of the possible application of the "rubber stamp" theory, by virtue of the cases cited by the court. Both *Matthews v. Columbia County*, 294 F.3d 1294 (11th Cir. 2002) and *Scala v. City of Winter Park*, 116 F.3d 1396 (11th Cir. 1997) discuss at length the municipal liability theories of delegation and ratification. A cursory review of *Matthews* and *Scala* shows that in its holding, the Eleventh Circuit properly required evidence that the commission itself, and not just one member, acted with an unconstitutional motive. The Eleventh Circuit simply found, and clearly found, that there was no sufficient evidence that the commission itself held an improper motive, or even knew of an improper motive.

Again, plaintiffs' argument fails to provide any compelling reasons why this Honorable Court should grant certiorari. They have failed to show that the Eleventh Circuit's municipal liability reasoning conflicts with any authority, this Court or that of any circuit court. Their arguments in #2 simply constitute factual disagreements with the Eleventh Circuit findings.

II. Plaintiffs fail to show compelling reasons as they have failed to point out any errors of moment in the Eleventh Circuit's analysis of their claims.

Arguments 3 and 4 of plaintiffs' petition[6] constitute further factual argument by plaintiffs. They point to an erroneous explanation by the Eleventh Circuit that, "the plaintiffs' own property is not similarly situated to itself!" but fail to show how the Eleventh Circuit's findings and its application of the law thereto so far depart from the accepted and usual course of judicial proceedings that a summary reversal should be issued. As such argument 3 takes great issue with the Eleventh Circuit's treatment of the similarly situated requirement, as well as the differing treatment requirement. That is, the Eleventh Circuit required plaintiffs to show that they were 1) similarly situated to other developers but 2) received different (and adverse) treatment. Plaintiffs did not make the required showing to satisfy this test, and thus their claims failed.

Argument 4 of plaintiffs is simply more disagreement with the appellate court's review of the sufficiency of the evidence.

Thus plaintiffs' arguments again present no compelling reasons for this Court to grant certiorari. Their arguments consist of factual disagreements and their general disquiet with the Eleventh Circuit's findings that plaintiffs had not presented sufficient evidence to support their claims. Their arguments suggest no conflicts of law; suggest no important federal questions which have been decided improperly; and show no departure from the accepted and usual course of judicial proceedings so as to warrant this Court's review.

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6. *See* Petition at 13 and 15, respectively.

III. Other reasons to deny the petition, and misstatements of fact and law contained in petitioners' brief.

In accordance with Rule 15.2 of the Supreme Court rules, respondent avers herein that there are further reasons for denying the petition and that there are several misstatements of fact and law in petitioners' brief.

In their "Questions Presented for Review" section, petitioners say that implicit in the issues is the question whether the Eleventh Circuit may create an artificial barrier to effectively insulate wrongdoing by municipal officials in power.[7] As with several other arguments put forth by petitioners, such phrasing begs the question. The Eleventh Circuit found that there was no evidence of any animus by the final policymaker, the planning commission for Rainbow City. In requiring animus by the final policymaker, the Eleventh Circuit's decision is in accord with well established case law regarding municipal liability under federal law.

Several comments by plaintiffs in their "conclusion" paragraph require response. First, the plaintiffs claim that by the City's tabling of their proposals, the city attorney, the City, and the City's insurance carrier were opposing a reasonable development. As plaintiffs well know, no mention of the City's insurance carrier is made in the trial record or the record on appeal. It is simply vexatious mention of liability insurance for obvious purposes. It is due to be struck and not considered.

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7. *See* "Questions Presented for Review" at i of Petition for Certiorari.

The petitioners also complain that the Eleventh Circuit oral arguments were not about "those items we were told to brief on, but instead were an attack on the character, intelligence, and motivation of the plaintiffs in a blatant disrespect for the judgment and opinions of law" of the trial judge. Such is not reflected anywhere in the record, and there is no attempt by plaintiffs to document it as such.

The petitioners further make mention of appellate mediation, which is in itself completely improper. The petitioners being "willing to negotiate in good faith" is, of course, not reflected anywhere in the record nor should it be. They further insinuate with their comments that the Eleventh Circuit had reasons "beyond the legal" for its actions.[8]

They finally request this Court consider a summary reversal of the Eleventh Circuit's opinion, as the opinion is "so erroneous that a briefing and argument may be a waste of time."

In response, respondent avers that while plaintiffs' venting of their proverbial spleen may be understandable, it is entitled to occupy no place in court. It is particularly not entitled to be placed before this Honorable Court.

And, despite the inequities they say they suffered at the hands of the United States Court of Appeals for the Eleventh Circuit, plaintiffs nonetheless show no more compelling reasons for this Court to grant certiorari than they presented in the earlier parts of their petition. When all is said and done, they fail to present sufficient reason why this Court,

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8. *See* petition at 16, 17.

with the way that it reviews cases, should grant the petition for certiorari. There are no conflicts within the federal circuits to resolve, and there is no significant federal question. The case is simply one of failure to provide sufficient evidence for the claims to go to the jury.

CONCLUSION

For the above and foregoing reasons, this Honorable Court should DENY the plaintiffs' petition for certiorari.

Respectfully submitted,

H. EDGAR HOWARD
140 South 9th Street
Post Office Box 388
Gadsden, Alabama 35902
(256) 546-5432

Counsel for Respondents